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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. ----------

RALPH SHINABERRY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,
acting through the County Production and
Marketing Administration Committee for
Hillsdale County, State of Michigan,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, wherein that court affirmed the judgment of the United States District Court for the Western District of Michigan, dismissing the complaint for the reason that the United States had not consented to be sued.

OPINIONS BELOW.

The opinion of the United States District Court, Judge Kent (Appendix p. 6, *infra*), has [redacted] been reported. 142 F. Supp.
No printed opinion was rendered or filed in the United States Court of Appeals for the Sixth Circuit, Judges Simons, Martin and Stewart.

JURISDICTION.

The judgment of the Court of Appeals (p. 9, *infra*), is dated and was rendered March 6, 1947. This Court has jurisdiction to review upon certiorari under 28 U. S. C. Sec. 1254 (1) upon petition filed within ninety days prescribed by 28 U. S. C. Section 2101(c).

QUESTION PRESENTED.

Has the United States consented by the enactment of U. S. C. Title 28, Section 2410 to allow petitioner to bring an action in the United States District Court where he resides and where his property is situated, and this petitioner has alleged in his complaint that he is in possession of a quantity of wheat, and that the United States has asserted a lien upon said wheat under a federal statute which is in violation of the Fifth Amendment to the Constitution of the United States, and which Act of Congress has deprived the petitioner of the equal protection of the law, in violation of Article IV, Section 2, Clause 1, of the Constitution of the United States.

CONSTITUTION AND STATUTES INVOLVED.

Article IV, Section 2, provides that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of property without due process of law.

U. S. C. Title 7, Section 1330, sub-section 4, provides that until the processor on any farm stores or delivers to the Secretary of Agriculture or pays the penalty on the farm marketing excess on any crop of wheat, the entire crop of wheat shall be subject to a lien in favor of the United States for the amount of the penalty.

U. S. C. Title 7, Section 1330, sub-section 5, provides:

"The penalty upon corn or wheat stored shall be paid by the producer at the time and to the extent of any depletion in the amount of any commodity so stored, except depletion resulting from some cause beyond the control of the producer."

U. S. C. Title 7, Sections 1334-1335, 1339-1340 provide for the assessment of the penalty upon wheat.

STATEMENT OF CASE.

This is an action brought by a farmer against the United States of America acting through the County Production and Marketing Administration Committee in the United States District Court for the Western District of Michigan, Southern Division, to quiet his title to a quantity of wheat situated in said district against the penalty claimed by the United States for excess acreage.

Constitutional Right Claimed.

Petitioner claims that the entire wheat marketing Act is in violation of the Fifth Amendment to the Constitution of the United States in this,—that he is being deprived of his property without due process of law, and that he is being denied the equal protection of the law within the meaning of Article IV, Section 2, Clause 1, of the United States Constitution.

District Court's Ruling.

District Judge Kent, of the Western District of the State of Michigan, dismissed the complaint on motion, without trial, on the grounds,

"The United States of America had not given its consent to be sued." (Appendix, pp. 8-9, *infra.*)

Affirmed by Court of Appeals.

The Court of Appeals (Judges Simons, Martin and Stewart) accepted the ground on which the District Court dismissed, and affirmed the judgment of the District Court.

BASIS OF JURISDICTION BELOW.

The District Court's Jurisdiction was invoked to protect petitioner's claim to equal protection of the laws, and to prevent the deprivation of his property without due process of law, and to quiet title to his wheat against the purported lien of the United States for excess acreage, under Title 28 U. S. C., Sec. 2410.

REASONS FOR ALLOWANCE OF WRIT.

This case presents an important question of federal jurisdiction.

Judgment Below is in Conflict With This Court's Decision Sustaining Jurisdiction on Cases of This Type.

The government has been litigating with its citizens long before the enactment of Title 28, Section 2410. The leading case is

U. S. vs. Lee, 106 U. S. 196 (1882)

which is a case involving title to the National Cemetery at Arlington, Va. The question before the court is, should Title 28, Sec. 2410 have a narrow construction or should it have a liberal construction in order to accomplish its purpose?

While the statutory waiver of sovereign's immunity is to be strictly construed, congressional adoption of broad statutory language authorizing suits against the United

States is not to be thwarted by an unduly restrictive interpretation.

The case most directly in point on this question is,

Canadian Aviator vs. U. S., 324 U. S. 215, 89 L. ed. 901, 65 S. Ct. 639.

National City Bank vs. Republic of China, et al., Decided March 7, 1955, 348 U. S. 356, 75 S. Ct. 427.

We quote from the opinion:

"but even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time, it has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereigns immunity is found in such observations in unanimous opinions of this Court as to the peculiar rights and preferences due to the sovereign has changed."

Inasmuch as the Court did not pass upon the constitutionality of the sections from the Agricultural Adjustment Act, we have refrained from argument upon this topic.

CONCLUSION.

The writ should issue.

Respectfully submitted,

GEORGE A. MEEKISON,
Napoleon, Ohio,
Counsel for Petitioner.

April 12, 1957.

APPENDIX.

OPINION OF THE DISTRICT COURT.

(Filed June 27, 1956.)

Plaintiff has commenced this action in an effort to restrain the Government from collecting penalties for violation of the Acts of Congress fixing wheat quotas,[1] alleging that the same are unconstitutional.

The matter is before the Court on the Government's motion to dismiss plaintiff's complaint, first, because the complaint fails to state a claim against the defendant upon which relief can be granted; second, on the ground that the United States of America has not granted consent to be sued, and, third, because the Secretary of Agriculture is an indispensable party and has not been made a party.

Pursuant to statute[2] a three-judge court was convened because a constitutional question was involved and the Honorable Thomas F. McAllister, United States Circuit Judge, and the Honorable Raymond W. Starr, United States District Judge, were designated to sit with the writer by the Honorable Charles C. Simons, Chief Judge for the United States Court of Appeals for the Sixth Circuit. Oral arguments were had and briefs have been filed. For reasons which will hereinafter appear, the Court is satisfied that there is no basis for a three-judge court because it is not necessary to rule upon the constitutional question raised. *Oklahoma Gas & Electric Co., et al. v. Oklahoma Packing Company* (1933), 292 U. S. 396. *Osage Tribe of Indians v. Ickes, et al.*, 45 F. Supp. 179, Aff'd. 133 F. 2d 47, Cert. Den. 319 U. S. 750.

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[1] Agricultural Adjustment Act of 1938, 7 U. S. C. A. § 1281 *et seq.*

[2] 28 U. S. C. A. §§ 2282, 2284.

It is well settled that the United States cannot be sued without its consent and also that it need not provide a judicial remedy against itself. 1 *Cyc. Fed. Proc.* § 2.26; 1 *Barron & Holtzoff Fed. Prac. & Proc.* § 54, and cases therein cited.

During the hearing on the motion and in the briefs, the plaintiff, through his counsel, does not dispute this statement of law but rather contends that the United States has consented to this suit. Plaintiff cites in support of his position 28 U. S. C. § 2410, which in part reads as follows:

> "(a) Under the conditions prescribed in this section and section 1444 of this title, for the protection of the United States, the United States may be named a party in any civil action or suit in any District Court, including the District Court for the Territory of Alaska, or in any State Court having jurisdiction of the subject matter to quiet title to or for the foreclosure of a mortgage or other liens upon real or personal property on which the United States has or claims a mortgage or other lien."

Plaintiff claims that his action is in fact an action to quiet his title to the wheat which he has grown in excess of the quota provided under the statute. He claims that the United States has asserted a lien against such wheat and therefore this action is authorized by the quoted section of 28 U. S. C. § 2410.

A somewhat similar question was raised in *Viviano v. United States*, E. D. Mich. 1952, 105 F. Supp. 312, wherein the Court said at page 314:

> "Notwithstanding the original complaint in this case is labeled 'Petition to Quiet Title' based on Title 28 U. S. C. A. § 2410, the facts as established and the briefs presented in series prompt this Court to the conclusion that this petition was not commenced to

determine title but was in effect nothing more than a suit to enjoin the collection of taxes in deviation of procedure set forth by Congress with respect to refund of internal revenue taxes.

"That an action is captioned so as to bring it within the court's jurisdiction is not sufficient."

The statute under which the imposition of penalty could be made is Title 7 U. S. C. A. § 1340. Section 1372 provides for the collection of such penalty and also provides for a means of refund if the "penalty was erroneously, illegally, or wrongfully collected." Section 1376 makes provision for suit to collect such penalty, and Section 1340 (4) provides for a lien on the entire crop of wheat produced on a farm for the amount of the penalty for any excess grown. See *Blatner v. United States,* Pa. 1955, 127 F. Supp. 628, Aff'd Third Circuit 1955, 223 F. 2d 468.

This Court is satisfied that the provisions of 28 U. S. C. § 2410 were not intended to apply to a situation such as the plaintiff alleges in this case. Statutes granting consent to sue and thereby surrendering sovereign immunity must be literally and narrowly construed. *Wallace v. United States* (2 Cir.) 142 F. 2d 240; *Minnesota v. United States,* 305 U. S. 382; *United States v. Sherwood,* 312 U. S. 586.

Any doubts as to consent or jurisdiction of the Court should be resolved in favor of the United States. 1 *Cyc. Fed. Proc.* § 2.34 and cases therein cited.

The Court is satisfied that this action was not instituted for the purpose of quieting the title to the crop of wheat involved but was instituted for the purpose of restraining the Government from collecting a statutory penalty.

For the reasons herein stated the motion to dismiss must be granted for the reason that the United States has

not consented to be sued and the action is dismissed. An order may be entered accordingly.

W. WALLACE KENT,

Judge, United States District Court.

June 26, 1956.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed March 6, 1957.)

Before SIMONS, *Chief Judge*, MARTIN AND STEWART, *Circuit Judges.*

Without attempting to avail himself of the administrative remedies provided in the Agricultural Adjustment Act of 1938, as amended, 7 U. S. C. A., § 1281, *et seq.*, the appellant brought this action to restrain the United States from collecting penalties for violation of the statutes fixing wheat quotas, alleging that those statutes violated the Constitution.

It was the appellant's contention that the provisions of 28 U. S. C. A., § 2410 (a) conferred upon the district court jurisdiction to entertain the action. The court held that section of the Code inapplicable, concluded that the United States has not consented to be sued in an action such as this, and accordingly dismissed the complaint. 142 F. Supp. 413 (1956).

For the reasons stated in the district court's opinion, the order of dismissal is affirmed.

Approved for entry:

/s/ POTTER STEWART,

United States Circuit Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 951

RALPH SHINABERRY, PETITIONER

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE COUNTY PRODUCTION AND MARKETING ADMINISTRATION COMMITTEE FOR HILLSDALE COUNTY, STATE OF MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 9) is not yet reported. The opinion of the District Court (Pet. App. 6–9) is reported at 142 F. Supp. 413.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1957 (Pet. App. 9). The petition for a writ of certiorari was filed on April 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In 1954, petitioner grew wheat on his farm in excess of the production and marketing quota set for him by

his local production and marketing administration committee under the provisions of the Agricultural Adjustment Act of 1938. Under amendments to this Act, petitioner is subject to a penalty proportionate to the amount of such excess production, and the United States has a lien upon his wheat crop for the amount of this penalty, 7 U. S. C., Supp. IV, 1340 (2), (4). Petitioner sued to enjoin the United States from enforcing the penalty or from asserting its lien upon his wheat. He contends that the Agricultural Adjustment Act of 1938 as applied to him violates the Constitution in various respects.

The question presented is whether the United States has consented, by 28 U. S. C. 2410, to a suit to enjoin the enforcement of a penalty and lien assessed on wheat produced in excess of a production and marketing quota, or whether the exclusive procedure for testing the validity of the production and marketing quotas on which the penalty is based is by a proceeding for judicial review of the quota, as provided, in the Agricultural Adjustment Act of 1938, 7 U. S. C. 1367.

STATUTES INVOLVED

28 U. S. C. 2410 (a):

> (a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or per-

sonal property on which the United States has or claims a mortgage or other lien.

* * * * *

7 U. S. C., Supp. IV, 1340 (2), (4):

* * * * *

(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

* * * * *

(4) Until the producers on any farm store, deliver to the Secretary, or pay the penalty on, the farm marketing excess of any crop of wheat, the entire crop of wheat produced on the farm shall be subject to a lien in favor of the United States for the amount of the penalty.

* * * * *

7 U. S. C. 1367:

The commencement of judicial proceedings under this Part shall not, unless specifically ordered by the court, operate as a stay of the review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this Part to review the legal validity of a determination made by a review committee pursuant to this Part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this Part.

STATEMENT

This action was instituted by petitioner, Ralph Shinaberry, to restrain the United States, through the County Production and Marketing Administration Committee for Hillsdale County, State of Michigan, from applying to him the production and marketing quota provisions of the Agricultural Adjustment Act of 1938, 7 U. S. C. 1281 *et seq.*, and from collection of penalties, or assertion of a lien therefor, based on wheat production in excess of the quota established for him by the County Committee.

The essential allegations of the complaint are as follows:

Petitioner owns and farms 150 acres situated in Hillsdale County, Michigan. In 1954, he was assigned a production quota of 9 acres of wheat but, in the regular course of his operations, he sowed 28 acres. Thereafter, the County Committee furnished him a notice of 1954 Marketing Quota and Farm Marketing Excess of wheat which advised him that he had an excess of wheat acreage of 19 acres, and that the production from these 19 acres constituted a farm marketing excess of 570 bushels which were subject to a total penalty of $638.40, at $1.12 per bushel. This wheat is stored upon petitioner's farm. The United States is threatening to file a lien against plaintiff's entire wheat crop for the amount of the penalty, and it demands that he deposit with its agents funds equal to the amount of the penalty, or warehouse receipts for the stored wheat, or a bond of indemnity for the amount of the penalty. The United States has denied plaintiff a wheat marketing

card and, as a result of such denial, his right to sell wheat has been impaired.

Petitioner contends that the aforesaid actions are unconstitutional, urging that the Agricultural Adjustment Act cannot be applied to him because he is not engaged in interstate commerce; that his property is being taken without due process of law; that the regulations under which respondent purports to act are legislative in nature and cannot be issued by the executive branch; that his right to transact business is being unlawfully restricted; and that he is being denied equal protection of the laws.

Plaintiff first filed a complaint seeking to enjoin the application to him of the quota and penalty provisions of the Agricultural Adjustment Act of 1938. Thereafter, he filed an amended complaint alleging that the United States was asserting a lien against the wheat stored on his farm and praying that the Agricultural Adjustment Act and the regulations promulgated thereunder be declared unconstitutional; that the United States be restrained from collecting any penalties; that the United States be enjoined from interference with plaintiff's production or marketing operations; that the court decree that the United States has no lien upon the 570 bushels of wheat stored on his farm; and that his title to the wheat be quieted as against the United States.

Because petitioner was seeking to enjoin the operation of a federal statute, a three-judge court was convened pursuant to the provisions of 28 U. S. C. 2282 (Pet. App. 6). The United States filed a motion to dismiss, urging (1) that petitioner's complaint

failed to state a cause of action on which relief could be granted; (2) that the district court lacked jurisdiction in that the United States had not consented to be sued; and (3) the Secretary of Agriculture was an indispensable party. The district court granted the motion to dismiss upon the ground that the United States has not consented to be sued. It found that the action was instituted not for the purpose of quieting title, but to restrain the Government from collecting the statutory penalties. (Pet. App. 8) The three-judge court was discharged because it was not necessary to rule on the constitutional question presented. (Pet. App. 6)

The Court of Appeals for the Sixth Circuit affirmed upon the same grounds stated in the district court's opinion. (Pet. App. 9)

ARGUMENT

Even if the United States had consented to be sued in this action, it is clear that petitioner has stated no cause of action since the objections which he raises to the constitutionality of the Agricultural Adjustment Act of 1938 were rejected by this Court in *Wickard* v. *Filburn,* 317 U. S. 111.

It is equally plain that there has been no consent to the suit. Petitioner admits that he has exceeded his assigned production quota. Apparently recognizing respondent's sovereign immunity (cf. *Stout* v. *United States,* 229 F. 2d 918 (C. A. 2), certiorari denied, 351 U. S. 982), he attempts to bring his action within the

scope of the statute (28 U. S. C. 2410) waiving that immunity in respect of actions to quiet title to personal property upon which the United States has a lien. Thus, he claims that the lien for the penalty he owes is a cloud upon his title to his wheat crop. In making this contention, however, petitioner has disregarded the provisions of the Agricultural Adjustment Act which set forth an *exclusive* procedure (*supra*, p. 3) for challenging the validity of production and marketing quotas and expressly deny to any court jurisdiction to review the validity of these quotas in any other proceeding. 7 U. S. C. 1367. *United States* v. *Lillard*, 143 F. Supp. 113 (W. D. Mo.); *United States* v. *Bonderer*, 139 F. Supp. 391 (W. D. Mo.); *United States* v. *Stangland*, 137 F. Supp. 539 (N. D. Ind.); cf. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, 321 U. S. 414. The lien which attaches to petitioner's wheat arises from a penalty which in turn depends upon the validity of the production and marketing quota which was assigned to him by his local county committee. Petitioner did not challenge this quota by the proceeding for review set forth in the Agricultural Adjustment Act of 1938, 7 U. S. C. 1363. Since this statutory remedy is exclusive and operates "[n]otwithstanding any other provision of law," 7 U. S. C. 1367, petitioner can obtain no support whatever from the provisions of 28 U. S. C. 2410, relating to actions to quiet title.

CONCLUSION

The decision below is clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
HOWARD E. SHAPIRO,
Attorneys.

MAY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957